

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

JAMES LEON MCCLAIN,

Plaintiff,

v.

CAROLYN W. COLVIN,  
Acting Commissioner of  
Social Security Administration,

Defendant.

3:14-cv-00186-RCJ-WGC

**REPORT & RECOMMENDATION OF  
U.S. MAGISTRATE JUDGE**

This Report and Recommendation is made to the Honorable Robert C. Jones, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR IB 1-4. Before the court is Plaintiff James Leon McClain's Motion for Remand/Reversal. (Docs. # 14 (Notice), # 14-1 (Pl.'s Br.))<sup>1</sup> The Commissioner filed a Cross-Motion to Affirm and Response to Plaintiff's Motion for Remand/Reversal. (Docs. # 15/16.)<sup>2</sup> Plaintiff filed a reply. (Doc. # 17.)

After a thorough review, the court recommends that Plaintiff's motion be denied, and that the Commissioner's cross-motion to affirm be granted.

**I. BACKGROUND**

Plaintiff filed his application for Disability Insurance Benefits (DIB) under Title II of the Social Security Act (Act) on October 2, 2012, and on February 26, 2013, protectively applied for Supplemental Security Income (SSI) under Title XVI of the Act. (Administrative Record (AR) 172-178, 197-206.) Plaintiff asserted that he became disabled on October 20, 2010, due to migraines, back problems (lumbar spine), shoulder problems, vision impairment, depression, and

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<sup>1</sup> Refers to court's docket number.

<sup>2</sup> These documents are identical.

1 anxiety (panic disorder). (AR 172, 199, 225-26.) The applications were denied initially and on  
2 reconsideration. (AR 108-120.) Plaintiff made a timely request for a hearing before an  
3 Administrative Law Judge (ALJ). (AR 122.) On July 29, 2013, Plaintiff appeared, represented by  
4 counsel, for a hearing before the ALJ. (AR 34-59.) The ALJ took testimony from Plaintiff and a  
5 vocational expert (VE). (*Id.*) On August 19, 2013, the ALJ issued a decision finding Plaintiff not  
6 disabled. (AR 17-33.)

7 Plaintiff appealed (AR 14-16) and the Appeals Council denied review on February 4,  
8 2014. (AR 4-6.) Thus, the ALJ's decision became the final decision of the Commissioner.

9 Plaintiff now appeals the decision to the district court. (Doc. # 14-1.) First, Plaintiff  
10 argues that the ALJ erred in failing to conclude that Plaintiff's mental impairments were severe  
11 at step two of her sequential evaluation process. (*Id.* at 9-17.) Second, he asserts that the ALJ  
12 erred in ignoring the opinion of his treating physician, Dr. George Mars, that following his back  
13 surgery in 2003, he should be limited to sedentary work, which would render him disabled under  
14 the regulations. (*Id.* at 17-19.) Finally, Plaintiff contends that the ALJ's determination that  
15 Plaintiff was not disabled was based in significant part on her finding that Plaintiff failed to  
16 obtain appropriate medical treatment without considering the reason Plaintiff stopped pursuing  
17 treatment at some point in 2011 was because he could not pay for treatment and had no  
18 insurance. (*Id.* at 20-22.)

19 Conversely, the Commissioner argues, first, that Plaintiff's contention regarding the  
20 ALJ's failure to find his mental impairments severe at step is a moot point, because the ALJ did  
21 find Plaintiff had a severe impairment (albeit, not associated with his mental impairments), and  
22 once that threshold is met, the ALJ is bound to assess Plaintiff's functional abilities based on all  
23 relevant evidence in the record, including impairments not found severe at step two. (Doc. # 15  
24 at 3.) As such, the Commissioner contends that the ALJ's finding at step two that Plaintiff's  
25 mental impairments were not severe (and rejecting the State consultative examining and  
26 reviewing psychological doctors' opinions) is supported by substantial evidence in the record.  
27 (*Id.* at 3-7.)  
28

1           Second, the Commissioner takes the position that the ALJ's failure to reference Dr. Mars'  
 2           opinions was not in error because Dr. Mars' assessment in 2003 that Plaintiff was limited to  
 3           sedentary work and his certification regarding Plaintiff's inability to walk more than 200 feet in  
 4           Plaintiff's application for a handicap placard in 2004 are not relevant to Plaintiff's functional  
 5           abilities with an alleged onset of disability date of October 2010. (*Id.* at 7-9.) Alternatively, if the  
 6           ALJ erred in failing to mention Dr. Mar's findings, the Commissioner maintains the error was  
 7           harmless, particularly when examining physician Dr. Pamela K. Corson, who reviewed  
 8           Plaintiff's records and examined him, opined he was capable of light work with additional  
 9           restrictions. (*Id.*)

10           Finally, the Commissioner contests Plaintiff's argument that the ALJ based her  
 11           determination that Plaintiff is not disabled on a failure to obtain appropriate medical treatment or  
 12           failure to follow prescribed treatment. (*Id.* at 9-12.) Instead, the Commissioner asserts that the  
 13           ALJ considered many factors in finding Plaintiff not disabled, including his wide range of  
 14           activities, ability to work after the alleged onset date, conservative treatment modalities used for  
 15           his back and shoulder pain, and his lack of significant treatment since 2010 was just one of those  
 16           factors. (*Id.* at 9-10.) With respect to his mental impairments, the Commissioner asserts that the  
 17           ALJ's discussion of Plaintiff's mental impairments was based on existing treatment records  
 18           which showed his mental status was within normal limits, and was not based on his inability or  
 19           failure to seek treatment. (*Id.* at 10-11.)

## 20           **II. STANDARD OF REVIEW**

21           The court must affirm the ALJ's determination if it is based on proper legal standards and  
 22           the findings are supported by substantial evidence in the record. *Gutierrez v. Comm'r Soc. Sec.*  
 23           *Admin.*, 740 F.3d 519, 522 (9th Cir. 2014) (citing 42 U.S.C. § 405(g)). "Substantial evidence is  
 24           'more than a mere scintilla but less than a preponderance; it is such relevant evidence as a  
 25           reasonable mind might accept as adequate to support a conclusion.'" *Gutierrez*, 740 F.3d at 523-  
 26           24 (quoting *Hill v. Astrue*, 698 F.3d 1153, 1159 (9th Cir. 2012)).

27           To determine whether substantial evidence exists, the court must look at the record as a  
 28           whole, considering both evidence that supports and undermines the ALJ's decision. *Gutierrez*,

740 F.3d at 524 (citing *Mayes v. Massanari*, 276 F.3d 453, 459 (9th Cir. 2001)). The court "may not affirm simply by isolating a specific quantum of supporting evidence." *Garrison v. Colvin*, 759 F.3d 995, 1009 (9th Cir. 2014) (quoting *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007)). "The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and for resolving ambiguities." *Id.* (quoting *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995)). "If the evidence can reasonably support either affirming or reversing, 'the reviewing court may not substitute its judgment' for that of the Commissioner." *Gutierrez*, 740 F.3d at 524 (quoting *Reddick v. Chater*, 157 F.3d 715, 720-21 (9th Cir. 1996)). That being said, "a decision supported by substantial evidence will still be set aside if the ALJ did not apply proper legal standards." *Id.* (citing *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1222 (9th Cir. 2009); *Benton v. Barnhart*, 331 F.3d 1030, 1035 (9th Cir. 2003)). In addition, the court will "review only the reasons provided by the ALJ in the disability determination and may not affirm the ALJ on a ground upon which he did not rely." *Garrison*, 759 F.3d at 1010 (citing *Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003)).

### **III. DISCUSSION**

#### **A. Five-Step Sequential Process**

Under the Social Security Act, "disability" is the inability to engage "in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 1382c(a)(3)(A). A claimant "shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work." 42 U.S.C. § 1382c(a)(3)(b).

The Commissioner has established a five-step sequential process for determining whether a person is disabled. 20 C.F.R. § 404.1520 and § 416.920; *see also Bowen v. Yuckert*, 482 U.S.

1 137, 140-41 (1987). If at any step the Social Security Administration (SSA) can make a finding  
 2 of disability or nondisability, a determination will be made and the SSA will not further review  
 3 the claim. 20 C.F.R. § 404.1520(a)(4) and § 416.920(a)(4); *see also Barnhart v. Thomas*, 540  
 4 U.S. 20, 24 (2003). "The burden of proof is on the claimant at steps one through four, but shifts  
 5 to the Commissioner at step five." *Garrison*, 759 F.3d at 1011 (quoting *Bray v. Comm'r of Soc.*  
 6 *Sec. Admin.*, 554 F.3d 1219, 1222 (9th Cir. 2009)).

7 In the first step, the Commissioner determines whether the claimant is engaged in  
 8 "substantial gainful activity"; if so, a finding of nondisability is made and the claim is denied.  
 9 20 C.F.R. § 404.1520(a)(4)(i), (b); § 416.920(a)(4)(i); *Yuckert*, 482 U.S. at 140. If the claimant  
 10 is not engaged in substantial gainful activity, the Commissioner proceeds to step two.

11 The second step requires the Commissioner to determine whether the claimant's  
 12 impairment or a combination of impairments are "severe." 20 C.F.R. § 404.1520(a)(4)(ii), (c) and  
 13 § 416.920(a)(4)(ii); *Yuckert*, 482 U.S. at 140-41. An impairment is severe if it significantly limits  
 14 the claimant's physical or mental ability to do basic work activities. *Id.* Basic work activities are  
 15 "the abilities and aptitudes necessary to do most jobs[.]" which include:

- 16 (1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling,  
 17 reaching, carrying, or handling; (2) Capacities for seeing, hearing, and speaking;  
 18 (3) Understanding, carrying out, and remembering simple instructions; (4) Use of  
 judgment; (5) Responding appropriately to supervision, co-workers and usual  
 work situations; and (6) Dealing with changes in a routine work setting.

19 20 C.F.R. § 404.1521 and § 416.921. If a claimant's impairment is so slight that it causes no  
 20 more than minimal functional limitations, the Commissioner will find that the claimant is not  
 21 disabled. 20 C.F.R. § 404.1520(a)(4)(ii), (c) and 416.920(a)(ii). If, however, the Commissioner  
 22 finds that the claimant's impairment is severe, the Commissioner proceeds to step three. *Id.*

23 In the third step, the Commissioner looks at a number of specific impairments listed in 20  
 24 C.F.R. Part 404, Subpart P, Appendix 1 (Listed Impairments) and determines whether the  
 25 impairment meets or is the equivalent of one of the Listed Impairments. 20 C.F.R.  
 26 § 404.1520(a)(4)(iii), (d) and § 416.920(a)(4)(iii), (c). The Commissioner presumes the Listed  
 27 Impairments are severe enough to preclude any gainful activity, regardless of age, education, or  
 28 work experience. 20 C.F.R. § 404.1525(a). If the claimant's impairment meets or equals one of

1 the Listed Impairments, and is of sufficient duration, the claimant is conclusively presumed  
2 disabled. 20 C.F.R. § 404.1520(a)(4)(iii), (d), § 416.920(d). If the claimant's impairment is  
3 severe, but does not meet or equal one of the Listed Impairments, the Commissioner proceeds to  
4 step four. *Yuckert*, 482 U.S. at 141.

5 At step four, the Commissioner determines whether the claimant can still perform "past  
6 relevant work." 20 C.F.R. § 404.1520(a)(4)(iv), (e), (f) and § 416.920(a)(4)(iv), (e), (f). Past  
7 relevant work is that which a claimant performed in the last fifteen years, which lasted long  
8 enough for him or her to learn to do it, and was substantial gainful activity. 20 C.F.R.  
9 § 404.1565(a) and § 416.920(b)(1).

10 In making this determination, the Commissioner assesses the claimant's residual  
11 functional capacity (RFC) and the physical and mental demands of the work previously  
12 performed. *See id.*; 20 C.F.R. § 404.1520(a)(4); *see also Berry v. Astrue*, 622 F.3d 1228, 1231  
13 (9th Cir. 2010). RFC is what the claimant can still do despite his or her limitations. 20 C.F.R.  
14 § 1545 and § 416.945. In determining RFC, the Commissioner must assess all evidence,  
15 including the claimant's and others' descriptions of limitation, and medical reports, to determine  
16 what capacity the claimant has for work despite the impairments. 20 C.F.R. § 404.1545(a) and  
17 § 416.945(a)(3).

18 A claimant can return to previous work if he or she can perform the "actual functional  
19 demands and job duties of a particular past relevant job" or "[t]he functional demands and job  
20 duties of the [past] occupation as generally required by employers throughout the national  
21 economy." *Pinto v. Massanari*, 249 F.3d 840, 845 (9th Cir. 2001) (internal quotation marks and  
22 citation omitted).

23 If the claimant can still do past relevant work, then he or she is not disabled for purposes  
24 of the Act. 20 C.F.R. § 404.1520(f) and § 416.920(f); *see also Berry*, 62 F.3d at 131 ("Generally,  
25 a claimant who is physically and mentally capable of performing past relevant work is not  
26 disabled, whether or not he could actually obtain employment.").

27 If, however, the claimant cannot perform past relevant work, the burden shifts to the  
28 Commissioner to establish at step five that the claimant can perform work available in the

1 national economy. 20 C.F.R. § 404.1520(e) and § 416.290(e); *see also Yuckert*, 482 U.S. at 141-  
 2 42, 144. This means "work which exists in significant numbers either in the region where such  
 3 individual lives or in several regions of the country." *Gutierrez*, 740 F.3d at 528. If the claimant  
 4 cannot do the work he or she did in the past, the Commissioner must consider the claimant's  
 5 RFC, age, education, and past work experience to determine whether the claimant can do other  
 6 work. *Yuckert*, 482 U.S. at 141-42. The Commissioner may meet this burden either through the  
 7 testimony of a vocational expert or by reference to the Grids. *Tackett v. Apfel*, 180 F.3d 1094,  
 8 1100 (9th Cir. 1999).<sup>3</sup>

9 If at step five the Commissioner establishes that the claimant can do other work which  
 10 exists in the national economy, then he or she is not disabled. 20 C.F.R. § 404.1566. Conversely,  
 11 if the Commissioner determines the claimant unable to adjust to any other work, the claimant  
 12 will be found disabled. 20 C.F.R. § 404.1520(g); *see also Lockwood*, 616 F.3d at 1071;  
 13 *Valentine v. Comm'r of Soc. Sec. Admin.*, 574 F.3d 685, 689 (9th Cir. 2009).

#### 14 **B. ALJ's Findings in this Case**

15 In the present case, the ALJ applied the five-step sequential evaluation process and  
 16 found, at step one, that Plaintiff had not engaged in substantial gainful activity since his alleged  
 17 onset date of October 20, 2010. (AR 22.)

18 At step two, the ALJ found it was established Plaintiff suffered from the following severe  
 19 impairments: degenerative disc disease of the lumbar spine and degenerative change of the right  
 20 acromioclavicular joint. (AR 22.) Additionally, she found that Plaintiff's depression and anxiety  
 21 were non-severe mental impairments. (AR 23.) While the record reflects that Plaintiff was  
 22 diagnosed with these mental impairments, the ALJ stated that the evidence did not indicate that

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23 <sup>3</sup> "The grids are matrices of the four factors identified by Congress—physical ability, age, education, and work  
 24 experience—and set forth rules that identify whether jobs requiring specific combinations of these factors exist in  
 25 significant numbers in the national economy." *Lockwood v. Comm'r of Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th  
 26 Cir. 2010) (internal quotation marks and citation omitted). The Grids place jobs into categories by their physical-  
 27 exertional requirements, and there are three separate tables, one for each category: sedentary work, light work, and  
 28 medium work. 20 C.F.R. Part 404, Subpart P, Appx. 2, § 200.00. The Grids take administrative notice of the  
 numbers of unskilled jobs that exist throughout the national economy at the various functional levels. *Id.* Each grid  
 has various combinations of factors relevant to a claimant's ability to find work, including the claimant's age,  
 education and work experience. *Id.* For each combination of factors, the Grids direct a finding of disabled or not  
 disabled based on the number of jobs in the national economy in that category. *Id.*

1 they imposed more than a minimal degree of limitation on Plaintiff's daily activities, social  
2 functioning, or ability to maintain concentration, persistence or pace. (AR 23.) The ALJ noted  
3 that Plaintiff reported he did not treat with mental health medication, counseling or therapy; he is  
4 able to prepare meals, go to church, socialize with friends and family, and use public  
5 transportation; he consistently exhibited a calm and stable mood with congruent affect on  
6 examination; and in November 2011, he reported he only had a little anxiety and depression.  
7 (AR 23.)

8 In January 2013, Dr. Anthony Edwards performed a consultative psychological  
9 evaluation of Plaintiff; his mood was variable and unstable and Dr. Edwards opined Plaintiff had  
10 moderate to marked deficits in following multiple-step tasks and instructions. (AR 23.) In  
11 addition, in February 2013, State agency consultants opined Plaintiff could maintain superficially  
12 appropriate interaction with coworkers and supervisors but would be best suited to work in a  
13 setting involving limited contact with the general public. (AR 23.) The ALJ gave "little weight"  
14 to Dr. Edwards' and the State agency psychological consultants' opinions because she found  
15 their restrictions were excessive in light of the objective medical evidence including the calm and  
16 stable mood with congruent affect consistently exhibited by Plaintiff throughout the treatment  
17 records. (AR 23.)

18 At step three, the ALJ concluded Plaintiff did not have an impairment or combination of  
19 impairments that meet or medically equal the severity of one of the Listed Impairments. (AR 23.)

20 At step four, the ALJ found Plaintiff has the RFC to perform light work as defined in  
21 20 C.F.R. § 404.1567(b) and 416.967(b) except: he can only occasionally perform postural  
22 activities; is unable to perform repetitive overhead right upper extremity reaching; should avoid  
23 extreme cold and vibrations; and should avoid hazards such as working at heights or operating  
24 dangerous moving machinery. (AR 24.)

25 The ALJ commented that the very limited objective medical evidence fails to provide  
26 strong support for Plaintiff's allegations of disabling symptoms and limitations. (AR 25.) She  
27 noted that while he had lumbar surgery in 2003, he only treated for low back pain on one  
28 occasion in January 2013 after the alleged onset date of October 20, 2010. (AR 25.) Despite his

1 reports of chronic low back and right shoulder pain, he exhibited no weakness, numbness,  
2 swelling as well as normal range of motion and strength on examination. (AR 25.) In January  
3 2011, he reported to his mental health examiner that he was able to walk several miles a day.  
4 (AR 25.) In July 2011, he reported he was able to work on a friend's truck. (AR 25.) Objective  
5 diagnostic imaging studies in January 2013 showed only mild degenerative changes of the right  
6 shoulder joint, and lower lumbar spondylosis with only mild atherosclerosis, and moderate  
7 degenerative disc disease at L4-L5. (AR 25.) Plaintiff underwent a consultative physical  
8 examination with Dr. Pamela Corson in January 2013, and exhibited full strength, normal gait  
9 and normal senses. (AR 25.) In February 2013 and March 2013, State agency medical consultant  
10 restricted Plaintiff to light exertional work. (AR 25.)

11 In light of his RFC, the ALJ concluded Plaintiff was unable to perform any past relevant  
12 work. (AR 26.)

13 At step five, the ALJ considered Plaintiff's age (51 years, defined as closely approaching  
14 advanced age on his alleged onset date), his high school education and ability to communicate in  
15 English, his work experience and RFC, as well as testimony from a VE to determine Plaintiff  
16 could perform jobs that exist in significant numbers in the national economy, including: fast food  
17 worker (DOT 311.472-010); hand packager (DOT 559.687-074); and office helper (DOT  
18 239.567-010). (AR 26-27.) As a result, the ALJ concluded Plaintiff was not disabled as of his  
19 alleged onset date of October 20, 2010, through the date of her decision. (AR 27.)

20 **C. ALJ's Finding at Step Two that Plaintiff's Mental Impairments are Not Severe**

21 Plaintiff first contends that the ALJ erred in failing to find that Plaintiff's mental  
22 impairments were severe at step two of the sequential analysis.

23 As noted above, a social security claimant must have a severe impairment (or  
24 combination of impairments) that significantly limits the physical or mental ability to do basic  
25 work activities, or they are found not disabled. *See* 20 C.F.R. § § 404.1520(c), 416.920(c). If the  
26 ALJ finds the claimant has an impairment(s) that is severe, the ALJ will proceed to step three.  
27 An impairment is not severe if it does not significantly limit the claimant's physical or mental  
28 ability to do basic work activities, which are defined as the abilities and aptitudes to do most

1 jobs, such as: (1) walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or  
2 handling; (2) seeing, hearing, and speaking; (3) understanding, carrying out, and remembering  
3 simple instructions; (4) use of judgment; (5) responding appropriately to supervision, co-workers  
4 and usual work situations; and (6) dealing with changes in a routine work setting. *See* 20 C.F.R.  
5 § § 404.1521, 416.921. The claimant must prove the physical or mental impairment by providing  
6 medical evidence consisting of signs, symptoms and laboratory findings; the claimant's own  
7 statement of symptoms alone will not suffice. *See* 20 C.F.R. § § 404.1508, 416.908.

8 “A determination that an impairment(s) is not severe requires a careful evaluation of the  
9 medical findings which describe the impairment(s) and an informed judgment about its limiting  
10 effects on the individual's physical or mental ability(ies) to perform basic work activities; thus,  
11 an assessment of function is inherent in the medical evaluation process itself.” SSR 85-28, 1985  
12 WL 56856, at \* 4 (1985). “An impairment or combination of impairments may be found ‘not  
13 severe *only if* the evidence establishes a slight abnormality that has no more than a minimal  
14 effect on an individual's ability to work.’” *Webb v. Barnhart*, 433 F.3d 683, 686 (9th Cir. 2005)  
15 (quoting *Smolen*, 80 F.3d at 1290) (emphasis original in *Webb*); *see also* SSR 85-28, 1985 WL  
16 56856, at \* 3 (1985). The step two inquiry is “a ‘de minimis screening device [used] to dispose  
17 of groundless claims,’ ... and an ALJ may find that a claimant lacks a medically severe  
18 impairment or combination of impairments only when his conclusion is ‘clearly established by  
19 medical evidence.’” *Webb*, 433 F.3d at 687 (quoting *Smolen*, 80 F.3d at 1290).

20 In addition, the ALJ is required to consider all relevant evidence, including medically  
21 determinable impairments not found to be severe at step two, in conducting the RFC assessment  
22 at step four. *See* 20 C.F.R. § § 404.1545(a)(2), 41.945(a)(2). Plaintiff at least implicitly argues  
23 that the ALJ erred in failing to consider Plaintiff's mental impairments in connection with the  
24 RFC assessment when she rejected the opinions of the State agency examining doctor and State  
25 agency consulting psychologist regarding Plaintiff's mental limitations, finding that they were  
26 contradicted by the objective mental health evidence in the record.

27 Therefore, at step two the court's inquiry concerning Plaintiff's mental impairments is  
28 whether the “ALJ had substantial evidence to find that the medical evidence clearly established

1 that [Plaintiff] did not have a medically severe impairment or combination of impairments.”  
2 *Webb*, 433 F.3d at 687 (citing *Yuckert*, 841 F.2d at 306). At step four, the court’s inquiry is  
3 similar: whether the ALJ’s decision not to consider Plaintiff’s mental impairments (and  
4 therefore, in rejecting the psychological consultant’s opinions concerning Plaintiff’s mental  
5 impairments) is supported by substantial evidence in the record.

6 In evaluating medical opinions, the court “distinguish[es] among the opinions of three  
7 types of physicians: (1) those who treat the claimant (treating physicians); (2) those who examine  
8 but do not treat the claimant (examining physicians); and (3) those who neither examine nor treat  
9 the claimant (nonexamining physicians).” *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 830 (9th  
10 Cir. 1995)). Treating physicians’ opinions are generally given more weight than examining or  
11 non-examining physicians. *Id.* In addition, “the opinion of an examining physician is entitled to  
12 greater weight than that of a non-examining physician.” *Id.* (citing *Ryan*, 528 F.3d at 1198). “The  
13 weight afforded a non-examining physician’s testimony depends on the degree to which [he or  
14 she] provide[s] supporting explanations for [his or her] opinions.” *Id.* (internal quotation marks  
15 omitted). When an examining doctor’s opinion is contradicted, the ALJ may reject it by  
16 providing specific and legitimate reasons that are supported by substantial evidence in the record.  
17 *Garrison*, 759 F.3d at 1012 (quoting *Ryan*, 528 F.3d at 1198).

18 Accordingly, the court will now review the ALJ’s findings and the evidence in the record  
19 regarding Plaintiff’s mental impairments to determine whether or not the ALJ erred in finding  
20 Plaintiff’s mental impairments not severe at step two (and in consequently not taking them into  
21 account at step four), and in rejecting the opinions of Dr. Anthony Edwards and the State agency  
22 psychological consultant in the process.

23 As indicated above, the ALJ acknowledged Plaintiff was diagnosed with depression and  
24 anxiety, but concluded that the evidence did not indicate his mental impairments imposed more  
25 than a minimal degree of limitation on his daily activities, social functioning or ability to  
26 maintain concentration, persistence or pace. (AR 23.) She noted that Plaintiff was able to prepare  
27 meals, go to church, socialize with friends and family and use public transportation; on  
28 examination he consistently exhibited a calm and stable mood with congruent affect; and in

1 November 2011, he reported he had only a little anxiety and depression. (AR 23.) The ALJ  
2 rejected the opinions of consultative psychological examiner Dr. Edwards and the reviewing  
3 State agency psychological consultants. (AR 23.) Dr. Edwards described Plaintiff's mood as  
4 variable and unstable, and opined Plaintiff had moderate to marked deficits in following multi-  
5 step tasks and instructions, and the reviewing consultants opined Plaintiff could maintain  
6 superficially appropriate interaction with coworkers and supervisors but would be best suited in  
7 work involving limited contact with the general public. (AR 23.) The ALJ found these  
8 restrictions were excessive in light of objective medical evidence, including the records that  
9 consistently described Plaintiff as having a stable mood and congruent affect. (AR 23.)

10 Plaintiff went to Churchill Community Hospital on December 28, 2004, complaining he  
11 was seeing and hearing things. (AR 481.) He was referred to mental health. (AR 482.) He  
12 reported depression for two to three months with rapid mood swings. (AR 484.) He had told his  
13 family that he wanted to get a gun and kill the people that were following him. (AR 484, 489.)  
14 He indicated that following his back surgery two years prior he had gradually become more  
15 negative as he became aware of his physical limitations and felt useless, depressed, moody and  
16 irritable. (AR 492.) He relayed that he had been hearing things and saw a little girl who visited  
17 him as well as other people following him. (AR 492-93.) His blood screen was positive for  
18 marijuana and methamphetamine. (AR 492.)

19 Plaintiff's next mental health record is dated December 7, 2010. (AR 331.) At that time,  
20 he reported anger and depression, evidenced by increased feelings of worthlessness and an  
21 inability to sleep through the night. (AR 331.) He indicated that his depression began after his  
22 work-related injury that ended with back surgery. (AR 331.) He was taking Zoloft. (AR 331.) He  
23 had no suicidal or homicidal ideations. (AR 331.) His affect was "appropriate," and his mood  
24 "anxious" and he was "restless and fidgety." (AR 332.) He was cooperative, but had "bizarre"  
25 thought content. (AR 332.) His insight and judgment were described as poor with pressured  
26 speech. (AR 332.) He was diagnosed with depression. He had a GAF score of 50. (AR 333.) The  
27 clinician indicated that Plaintiff appeared to need a medication assessment and could benefit  
28 from individual therapy to address issues of anger management and self-esteem. (AR 333.)

1 Plaintiff was then seen at Nevada Division of Mental Health and Developmental Services  
2 on January 14, 2011. (AR 317.) He was on time, clean and neatly dressed, with good eye contact  
3 and good thought process. (AR 317.) His speech was regular. (AR 317.) He reported more mood  
4 swings in the past years and indicated Zoloft was no longer working. (AR 317.) He reported that  
5 his back pain was rated at a six on a scale of one to ten and he was walking several miles a day.  
6 (AR 317.) He was advised to follow up as needed. (AR 317.)

7 Plaintiff underwent a psychiatric evaluation on January 28, 2011. (AR 314-15.) He  
8 relayed that he lost his job after a verbal outburst in October 2010, and got divorced in December  
9 2010. (AR 314.) He was suspicious his wife was having an affair with a co-worker. (AR 314.)  
10 He was diagnosed with depression in 2003 following a back injury in 2001. (AR 314.) He was  
11 described as calm with a congruent mood and affect. (AR 314.) He denied suicidal or homicidal  
12 ideation, and there were no psychosis or manic symptoms (AR 315.) He was alert and oriented,  
13 his memory was good, and his judgment/insight/impulse control appeared intact. (AR 315.) He  
14 reported a good relationship with his two biological children. (AR 315.) His principal diagnosis  
15 was mood disorder. (AR 315.) He was taking Zoloft, which he reported helped, but not as much  
16 as when he first started it, but he tolerated it well. (AR 315.) His Zoloft dose was increased. (AR  
17 317.)

18 Plaintiff was seen on March 25, 2011 at a mental health clinic in Fallon, and reported  
19 having to stop his job as a prep cook because it required too much lifting. (AR 317.) He was  
20 living with his son and granddaughter, with whom he had a good relationship. (AR 317.) He  
21 reported a long history of insomnia, and stated he had been off Zoloft for a week and a half as he  
22 had some difficulty getting the medication. (AR 317.) He was described as alert and oriented  
23 with normal speech, and was calm with a congruent mood and affect. (AR 317.) He denied a  
24 plan to harm himself or others, and there were no symptoms of psychosis. (AR 317.) Zoloft was  
25 discontinued and he was started on Prozac as well as Trazodone for the insomnia. (AR 317.) He  
26 was advised to return to the clinic in three weeks. (AR 317.)

27 Plaintiff was seen on April 13, 2011, and was clean and dressed neatly, with good eye  
28 contact, and logical and organized thoughts. (AR 318.) He tried joking during the assessments

1 and had appropriate smiles. (AR 318.) He denied suicidal or homicidal ideations, and denied  
2 hallucinations. (AR 318.) He reported he was medication compliant but still had trouble sleeping  
3 at night. (AR 318.) He was encouraged to discuss this with his physician and to get an increase in  
4 his Trazadone prescription for better sleep. (AR 318.) He reported that his lumbar spine pain was  
5 a seven on a scale of one to ten, and Vicodin was not available so he was taking only Tylenol for  
6 his pain which did not relieve his discomfort. (AR 318.) He was given contact information for  
7 pain management. (AR 318.)

8 Plaintiff's depression diagnosis was noted on April 15, 2011. (AR 318.) He reported that  
9 he was still looking for work, was living with his son and granddaughter, and helped with  
10 cooking and cleaning. (AR 318.) He said the Trazadone helped his sleep a little. (AR 318.) He  
11 was alert, oriented, with normal speech. (AR 318.) He was calm with a congruent affect, and  
12 denied suicidal or homicidal ideations, and no delusions. (AR 318.) He was advised to try two  
13 tabs of Trazadone and was told to follow up with his therapist and continue on Prozac. (AR 318.)

14 Plaintiff was seen on May 13, 2011, and reported that his neighbor gave him a hard time  
15 this week, but he handled it well. (AR 318.) He reported that he was doing well, had gone to a  
16 job fair and spent time with his grandkids. (AR 318.) He was alert, oriented with normal speech,  
17 and appeared calm with a congruent mood and affect. (AR 318.) He denied any plans to harm  
18 himself or others, and there were no symptoms of psychosis. (AR 318.) He was prescribed  
19 Trazodone and Prozac, which he appeared to be tolerating well, and was advised to follow up  
20 with his therapist. (AR 318.)

21 On June 16, 2011, Plaintiff reported doing well, and that his mood was well. (AR 319.)  
22 He only complained of back pain. (AR 319.) He had visited with a friend the day before, enjoyed  
23 movies, went home and cooked his meal. (AR 319.) He was alert and oriented, and appeared  
24 calm with a congruent mood and affect. (AR 319.) He was to continue on Prozac and Trazadone  
25 and to follow up with his therapist. (AR 319.)

26 On July 29, 2011, Plaintiff reported: "I feel fine." (AR 319.) He took his two  
27 granddaughters to the park the day before and had a good time. (AR 319.) He enjoyed watching  
28 television and also helped a friend work on his truck the day before. (AR 319.) His mood was

1 described as stable with no new complaints. (AR 319.) He was alert and oriented, was calm with  
2 a congruent mood and affect, and appeared to tolerate his medications well. (AR 319.) He was  
3 continued on the medications and was advised to follow up with his therapist. (AR 319.)

4 On September 9, 2011, Plaintiff reported that his mother-in-law passed away that day of  
5 cancer. (AR 319.) He had been divorced in December 2010, but always cared for his mother-in-  
6 law. (AR 319.) He reported that he had supportive friends and family, and planned to discuss this  
7 with his therapist. (AR 319.) He was alert and oriented, and was calm with a congruent mood  
8 and affect. (AR 319.) He expressed hope for the future. (AR 319.) He was continued on his  
9 medications. (AR 319.)

10 On September 30, 2011, he stated he was “coping pretty well” after his mother-in-law’s  
11 death. (AR 320.) He thought about her daily, but said she is no longer in pain and is in a better  
12 place. (AR 320.) It was noted that Plaintiff had support from his son and family, and his therapist  
13 also felt he was coping well. (AR 320.) He had no new complaints. (AR 320.) He was alert and  
14 oriented, and was calm with a congruent mood and affect. (AR 320.) He was to continue on his  
15 medications. (AR 320.)

16 On November 4, 2011, Plaintiff appeared calm and cooperative to staff, and reported his  
17 medications were effective. (AR 320.) He reported “a little” anxiety and depression, but denied  
18 suicidal or homicidal ideation or psychosis. (AR 320.) He further reported that he felt stable, that  
19 he was able to stay calm on a daily basis and did not get angry easily. (AR 320.) He felt his  
20 medications were working well, his family was supportive and he was enjoying his  
21 grandchildren. (AR 320.) He appeared calm with a congruent mood and affect, and was advised  
22 to continue on his medications. (AR 320.)

23 At a January 5, 2013 emergency room visit, he was described as cooperative with an  
24 appropriate mood and affect. (AR 344.)

25 Plaintiff underwent a psychological evaluation with Dr. Edwards on January 28, 2013.  
26 (AR 391-95.) Dr. Edwards described Plaintiff as appearing exceptionally anxious and had  
27 warned Dr. Edwards soon after his arrival that he easily loses his temper. (AR 391.) When he  
28 was asked to describe his current problems or conditions that affect his ability to do work, he

1 reported he does not do well under stress and sometimes gets mad easily; he does not do well  
2 with new things and has a hard time saying how he feels; and does not sleep well. (AR 391.) He  
3 reported counseling for mental health problems at Fallon Mental Health Clinic from 2003  
4 through 2010 for depression, and reported his depression is usually a six on a scale of one to ten,  
5 with his anxiety at a level eight. (AR 391.) He was not then taking any prescription medications  
6 because he had no funds and no insurance. (AR 391.) He reported he could not work due to the  
7 pain in his lower back, arms, shoulder, legs and feet. (AR 392.)

8 On examination, Dr. Edwards described Plaintiff as “very stiff” and “quite anxious.” (AR  
9 392.) He was adequately dressed and sufficiently groomed. (AR 392.) His mood was “variable  
10 and unstable.” (AR 392.) He was very suspicious and uncomfortable with the examiner. (AR  
11 392.) His affect was “restricted.” (AR 392.) His interaction style was “hostile.” His word  
12 pronunciation was “mumbled.” (AR 392.) He denied hallucinations. (AR 392.) He denied  
13 suicidal or homicidal ideations. (AR 392.) He reported that he was depressed every day, had lost  
14 energy, a decreased appetite and trouble sleeping. (AR 392.) He reported difficulty  
15 concentrating, excessive anxiety and panic attacks. (AR 392.) He was able to maintain  
16 concentration and attention sufficient to carry out one- and two-step tasks and instructions. (AR  
17 393.) He reported waking up, having coffee, eating meals, watching television, playing on the  
18 computer and bathing. (AR 393.) He participated in occasional outings with friends and family,  
19 occasionally attended church. (AR 393.) He visited with family and used the phone to call  
20 friends, family and businesses. (AR 393.) He watched television and listened to music, cooked  
21 and did dishes; went shopping with his fiancé, made a shopping list; handled money; bathed and  
22 dressed himself; and could usually remember what he reads and watches on television. (AR 393.)

23 Dr. Edwards assessed Plaintiff as being able to understand, remember and carry out  
24 detailed and simple but not complex instructions. He was oriented, and had some cognitive  
25 deficits but they were moderate to mild. (AR 394.) Dr. Edwards concluded that based on the  
26 “brief examination, MSE and clinical evaluation and self-reports,” Plaintiff would have difficulty  
27 with appropriate interactions with supervisors, co-workers, and the general public. (AR 394.) He  
28 was assessed with a GAF of 35. (AR 394.) Dr. Edwards stated that Plaintiff’s prognosis was poor

1 and he was unable to receive mental health counseling or psychiatric medication monitoring  
2 which would help him. (AR 395.)

3 A State agency consultant assessed Plaintiff in February 2013 as having mild restrictions  
4 in activities of daily living, moderate difficulties in maintaining social functioning, and mild  
5 difficulties in maintaining concentration, persistence or pace. (AR 75.) The consultant noted  
6 there were no significant limitations attributable to mental factors. (AR 75, 76.) The consultant  
7 went along with Dr. Edwards' conclusion that Plaintiff could carry out one and two-step tasks,  
8 but would have some problems with interactions at work. (AR 75.) The consultant opined  
9 Plaintiff was moderately limited in his ability to interact appropriately with the general public;  
10 moderately limited in his ability to accept instructions and respond appropriately to criticism  
11 from supervisors; and moderately limited in his ability to get along with coworkers or peers  
12 without distracting them or exhibiting behavioral extremes. (AR 79.) Finally, the consultant  
13 assessed that Plaintiff is capable of maintaining superficially appropriate interactions with  
14 coworkers and supervisors and would be best suited to work in a setting that involved limited  
15 contact with the general public. (AR 79.) In light of these findings, the consultant still concluded  
16 that Plaintiff was not disabled. (AR 81.)

17 At the hearing before the ALJ, Plaintiff testified that the effect his depression and anxiety  
18 have on him depends upon his stress levels. (AR 52.) Sometimes he finds it hard to get out of  
19 bed, and this occurs approximately ten to twelve days a month. (AR 52.) He had not taken  
20 anything for his condition in a couple of years, and did not attend counseling. (AR 53.)

21 In assessing Plaintiff's ability to perform work, the ALJ did not pose any mental  
22 limitations to the VE. (AR 55.)

23 The court finds that the ALJ's decision to find Plaintiff's mental impairments not severe  
24 at step two is supported by substantial evidence in the record, and that the ALJ set forth specific  
25 and legitimate reasons for rejecting the opinions of Dr. Edwards and the State agency consultant  
26 that are likewise supported by substantial evidence in the record. These issues are tied together in  
27 that the ALJ's determination that Plaintiff's mental impairments were not severe was based on  
28

1 her rejection of these opinions on the basis that they were not supported by Plaintiff's mental  
2 health treatment records.

3 The ALJ correctly points out that the opinions of the consultative physicians are simply  
4 not supported by the objective evidence in the record. While Plaintiff reported serious mental  
5 health complaints in 2004 and then in 2010, there are no other treatment records during this time  
6 period to indicate what the state of Plaintiff's mental health was or the what impact it was having  
7 on his ability to function. His provider determined in 2010 that he would benefit from  
8 medication and individual therapy, and the treatment records from 2010 to 2011 consistently  
9 support the ALJ's conclusion that Plaintiff's mental impairments were not severe, *i.e.*, were  
10 having no more than a minimal effect on his functional abilities.

11 As the ALJ noted, the treatment records consistently describe Plaintiff as having a good  
12 thought process, as being calm with a congruent mood and affect with no symptoms of  
13 psychosis. His memory was always described as good, with intact judgment and insight. His  
14 medication was managed which allowed his mental health symptoms to improve to stability and  
15 aided his sleep. He was described as cooperative and acting appropriately. He went to job fairs  
16 and described himself as doing well, and as enjoying activities and interactions with his family  
17 and friends. He coped well with a tragic incident of losing someone close to him. In November  
18 2011, he said he had a "little" anxiety, but also described himself as calm and as not angering  
19 easily. These treatment records contain absolutely zero support for the conclusions of  
20 Dr. Edwards, who described his own interaction with Plaintiff as "brief." The State agency  
21 consultant have even less support as those conclusions were based only a records review and an  
22 otherwise unexplained endorsement of Dr. Edwards' opinions. It is notable that even when  
23 adopting Dr. Edwards' opinions regarding Plaintiff's ability to interact with supervisors, the  
24 State agency consultant still determined Plaintiff was not disabled.

25 In sum, the court finds that the ALJ's determinations regarding Plaintiff's mental  
26 impairments are supported by substantial evidence in the record and recommends affirming the  
27 ALJ on this basis, and denying Plaintiff's motion on this point.

28

1           The court will now address Plaintiff's contention that mental health notes from Plaintiff's  
2 therapist at Fallon Mental Health are missing from the record and that the court should remand  
3 the case because the ALJ failed to fully develop the record. (Doc. # 14-1 at 16-17.) The  
4 Commissioner contends that the ALJ did fully develop the record, and points out that Plaintiff's  
5 attorney never pointed out any deficiencies in the record at the hearing, did not ask the ALJ to  
6 request additional evidence, or ask the ALJ to hold the record open to submit additional  
7 evidence. (Doc. # 15 at 6.)

8           Plaintiff asserts that the ALJ failed to fully develop the record as treatment notes from  
9 Plaintiff's therapist are missing. It is undisputed that the agency sought all records from Fallon  
10 Mental Health. As the Commissioner points out, Plaintiff does not indicate that he made the ALJ  
11 aware that the record was deficient at the hearing. He did not ask the ALJ to hold the record open  
12 to submit this evidence. He did not seek to submit additional evidence in the appeals process.  
13 Nor does Plaintiff address whether these missing treatment records support his position that he  
14 suffered from severe mental impairments. Instead, Plaintiff asks the court to reverse the ALJ's  
15 decision on the basis that the ALJ did not review some records the ALJ was not made aware  
16 existed. It is true that the ALJ "has an independent duty to fulfill and fairly develop the record  
17 and to assure that the claimant's interests are considered." *Tonapetyan v. Halter*, 242 F.3d 1144,  
18 1150 (9th Cir. 2001) (internal citations and quotation marks omitted). "Ambiguous evidence, or  
19 the ALJ's own finding that the record is inadequate to allow for proper evaluation of the  
20 evidence, triggers the ALJ's duty to conduct an appropriate inquiry." *Id.* (citations and quotation  
21 marks omitted).

22           The court does not find the ALJ abrogated her duty to develop the record under these  
23 circumstances. The ALJ requested the records from Fallon Mental Health. Plaintiff, who is  
24 represented by counsel, failed to apprise the ALJ that any records were missing throughout the  
25 process. Moreover, a court may remand to the ALJ for consideration of new evidence when new  
26 evidence is "material" and new evidence is "material" "only where there is a reasonable  
27 possibility that the new evidence would have changed the outcome of the ... determination had it  
28 been before [the ALJ]." *Booz v. Sec'y of Health & Human Servs.*, 734 F.2d 1378, 1380 (9th Cir.

1 1984) (quotation marks and citation omitted); *see also* 42 U.S.C. § 405(g). Here, there is no  
2 indication by Plaintiff that this missing evidence would have changed the outcome of his case  
3 had it been before the ALJ. Therefore, there is no basis to remand to the ALJ based on this  
4 assertion that certain records are missing.

5 **D. ALJ's Failure to Acknowledge Dr. Mars' Opinions**

6 Next, Plaintiff argues that the ALJ erred in failing to acknowledge: (1) that Dr. Mars  
7 deemed Plaintiff was limited to sedentary work on December 1, 2003 (following Plaintiff's July  
8 2003 back surgery); and (2) in June 2004, Dr. Mars indicated on a handicap placard application  
9 that Plaintiff was permanently disabled in his inability to walk.

10 On December 1, 2003, Dr. Mars indicated that Plaintiff was able to return to work  
11 effective December 9, 2003 at a sedentary level. (AR 594.) He further indicated Plaintiff could  
12 occasionally sit, walk, stand, bend at the hips, climb stairs, and repetitively use his hands, except  
13 that he could never stoop or reach above his head. (AR 594.) He was limited to occasionally  
14 lifting up to ten pounds up to between the knees and chest, and carrying up to ten pounds for up  
15 to five feet. (AR 594.) Plaintiff was restricted in not being able to squat to the floor, and was to  
16 limit forward and lateral full arm reaching to occasional during hand use. (AR 594.)

17 Then on June 7, 2004, Dr. Mars signed Plaintiff's application for a disabled person's  
18 license plate and/or placard, indicating Plaintiff could not walk 200 feet without stopping to rest,  
19 and stating that the condition is irreversible, that Plaintiff is permanently disabled in his ability to  
20 walk. (AR 221.)

21 The ALJ did not comment on Dr. Mar's restriction of Plaintiff to sedentary work on  
22 December 1, 2003, or the June 7, 2004 handicap placard application. The Social Security  
23 Regulations provide that in determining disability, the agency "will always consider the medical  
24 opinions in your case record together with the rest of the relevant evidence" received, and  
25 "[r]egardless of its source, we will evaluate every medical opinion we receive." 20 C.F.R.  
26 § 404.1527(b), (c); *see also Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) ("The  
27 ALJ must consider all medical opinion evidence."). The ALJ erred in failing to acknowledge  
28 Dr. Mar's assessments of Plaintiff; that was in error. "Because a court must give 'specific and

1 legitimate reasons’ for rejecting a treating doctor’s opinions, it follows even more strongly that  
 2 an ALJ cannot in its decision totally ignore a treating doctor and his or her notes, without even  
 3 mentioning them.” *Marsh v. Colvin*, --- F.3d ---, 2015 WL 4153858, at \* 2 (9th Cir. July 10,  
 4 2015).

5 The court must now consider whether that error is harmless, as the Commissioner argues.  
 6 The Ninth Circuit recently confronted this issue in *Marsh v. Colvin*. *Marsh*, 2015 WL 4153858,  
 7 at \* 1-3. The Ninth Circuit confirmed that harmless error analysis is applied in social security  
 8 cases, and applied the harmless error analysis in *Marsh* “to assess the impact of the ALJ’s failure  
 9 to even mention Dr. Betat or his SOAP notes, let alone its failure to give ‘specific and legitimate  
 10 reasons that are supported by substantial evidence’ for rejecting a treating source’s medical  
 11 opinion.” *Marsh*, 2015 WL 4153858, at \* 1 (citing *Garrison v. Colvin*, 759 F.3d 995, 1012 (9th  
 12 Cir. 2014)). In other words, harmless error analysis can be applied even in a case where an ALJ  
 13 wholly fails to mention the opinion of a treating doctor. *Id.* at \* 2, 3. “ALJ errors in social  
 14 security cases are harmless if they are ‘inconsequential to the ultimate nondisability  
 15 determination’ and ... ‘a reviewing court cannot consider [an] error harmless unless it can  
 16 confidently conclude that no reasonable ALJ, when fully crediting the testimony, could have  
 17 reached a different disability determination.’” *Id.* (quoting *Stout v. Comm’r, Soc. Sec. Admin.*,  
 18 454 F.3d 1050, 1055-56 (9th Cir. 2006)).

19 [W]here the circumstances of the case show a substantial likelihood of prejudice,  
 20 remand is appropriate so that the agency can decide whether re-consideration is  
 21 necessary. By contrast, where harmless is clear and not a borderline question,  
 22 remand for reconsideration is not appropriate.

23 *McLeod v. Astrue*, 640 F.3d 881, 888 (9th Cir. 2011). “[T]he more serious the ALJ’s error, the  
 24 more difficult it should be to show the error was harmless.” *Marsh*, 2015 WL 4153858, at \* 3.

25 Here, unlike the Ninth Circuit in *Marsh*, the court can confidently conclude that the  
 26 ALJ’s error in not mentioning Dr. Mars’ assessments is harmless.

27 In *Marsh*, unlike this case, the record contained progress notes from the claimant’s  
 28 physician for a period of approximately three years, including a clinical progress note stating that  
 the claimant was “pretty much nonfunctional” and appeared to be disabled. *Marsh*, 2015 WL  
 4153858, at \* 1. Here, the record only contains a single page where Dr. Mars restricted Plaintiff

1 to sedentary work upon his return to work following back surgery on December 1, 2003, and a  
2 certification in a June 7, 2004 handicap placard application that Plaintiff could not walk 200 feet  
3 without stopping to rest. As the Commissioner points out, these assessments were made in 2003  
4 and 2004, *six and seven years* prior to Plaintiff's alleged onset date. Moreover, Dr. Mars'  
5 assessment is not accompanied by *any* treatment or clinical progress notes that would support a  
6 finding that the restriction to sedentary work after Plaintiff's back surgery should have remained  
7 with Plaintiff through his alleged onset date. Instead, the medical evidence demonstrates  
8 otherwise.

9 As indicated above, the "ALJ is not bound by an expert medical opinion on the ultimate  
10 question of disability, [but] she must provide 'specific and legitimate' reasons for rejecting the  
11 opinion of a treating physician." *Tommasetti*, 533 F.3d at 1041 (citation omitted). "The ALJ can  
12 meet this burden by setting out a detailed and thorough summary of the facts and conflicting  
13 clinical evidence, stating [her] interpretation thereof, and making findings." *Id.* (citation  
14 omitted). An ALJ must similarly provide specific, legitimate reasons based on substantial  
15 evidence in the record for rejecting a treating physician's opinion that is contradicted by another  
16 doctor. *See Valentine v. Comm'r of Soc. Sec. Admin.*, 574 F.3d 685, 692 (9th Cir. 2009).

17 Here, the ALJ did in fact provide specific and legitimate reasons for finding Plaintiff not  
18 disabled, and properly, even if implicitly, rejected a restriction to sedentary work. The ALJ noted  
19 that Plaintiff had back surgery in 2003, but only treated for low back pain on one occasion after  
20 his alleged onset date in October 2010. (AR 25.) The ALJ pointed out that despite his reports of  
21 chronic pain, Plaintiff exhibited no weakness, no numbness, a normal range of motion, normal  
22 strength and no swelling. (AR 25.) In January 2011, he reported to his mental health counselor  
23 that he was able to walk several miles a day which directly contradicts any claim that he should  
24 be limited to sedentary work. (AR 25.) In July 2011, he was able to work on his friend's truck.  
25 (AR 25.) The ALJ next pointed out that objective diagnostic imaging studies only revealed mild  
26 to moderate degenerative changes and did not support Plaintiff's claim of debilitating injury.  
27 (AR 25.) The ALJ then reviewed the findings of State agency examining consultant, Dr. Pamela  
28 Corson. (AR 25.) On examination, Plaintiff exhibited full grip strength, a normal gait, full upper

1 extremity strength and normal sensory exam. (AR 25.) Dr. Corson opined Plaintiff could stand  
2 for two hours in an eight hour day, and sit for six hours in an eight hour day. (AR 25.)<sup>4</sup>

3 Although Plaintiff does not make the argument here, the court notes that the ALJ gave  
4 specific, legitimate reasons for rejecting Dr. Corson's opinion on the two-hour standing  
5 limitation, finding it to be inconsistent with clinical examination findings, including full grip  
6 strength, a normal gait, full upper extremity strength and a normal sensory examination. (AR 25.)

7 The ALJ then discussed the findings of the State agency medical consultant. (AR 26.)  
8 Notably, that consultant assessed Plaintiff as being able to stand/walk for six hours in an eight  
9 hour day, indicating that the opinion of Dr. Corson limiting Plaintiff further was not consistent  
10 with previous findings or imaging studies. (AR 76-78.) Both Dr. Corson and the consulting  
11 physician opined Plaintiff could occasionally lift or carry up to twenty pounds and frequently lift  
12 or carry ten pounds, which is consistent with the light work RFC assigned to Plaintiff by the  
13 ALJ. (See AR 24, 77-78, 405.)

14 Even if the court credited Dr. Mars' assessment that Plaintiff was restricted to sedentary  
15 work following his surgery in 2003 and inability to walk more than 200 feet, the court can  
16 confidently say that the ALJ cited specific and legitimate reasons for finding Plaintiff was not  
17 limited to sedentary work in the face of Dr. Corson's opinion regarding Plaintiff's ability to  
18 sit/stand; therefore, the ALJ would not have reached a different disability determination in light  
19 of Dr. Mars' assessments. As a result, the court finds the ALJ's failure to mention Dr. Mars'  
20 assessments is harmless.

21 ///

22 ///

23 ///

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24  
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27 <sup>4</sup> A sedentary job "is defined as one which involves sitting," but "a certain amount of walking and standing  
28 is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally  
and other sedentary criteria are met." 20 C.F.R. §§ 404.1567(a), 416.967(a). Light work, on the other hand, involves  
jobs that require "a good deal of walking or standing, or ... sitting most of the time with some pushing and pulling of  
arm or leg controls." 20 C.F.R. §§ 404.1567(b), 416.967(b).

**E. Did the ALJ Improperly Base her Non-Disability Determination on Plaintiff's Failure to Obtain Appropriate Treatment Without Taking Into Account his Inability to Pay for Treatment and Lack of Insurance?**

Finally, Plaintiff argues that the ALJ's nondisability finding was based in significant part on her finding that Plaintiff failed to obtain appropriate medical treatment in violation of agency policy set forth in Social Security Ruling 82-59. (Doc. # 14-1 at 20-22.) Plaintiff contends that the ALJ should have taken into account that Plaintiff was no longer seeking medical attention because he did not have insurance and was unable to pay for medical services. (*Id.*)

First, the court disagrees with Plaintiff's characterization of the ALJ's findings. The ALJ did not base her nondisability finding on Plaintiff's failure to obtain appropriate medical treatment. Yes, the ALJ mentioned that there was limited objective medical evidence in the record, and that is true, but the ALJ did not base her nondisability determination in significant part on the fact that there was limited evidence. The ALJ also commented that Plaintiff only treated for low back pain once after his alleged onset date. (AR 25.) The alleged onset date was October 2010. Plaintiff's back surgery took place in 2003. The fact that he only treated once after the alleged onset date is therefore relevant to the RFC analysis. The ALJ did not state or even imply that Plaintiff failed to obtain appropriate treatment; to the extent the ALJ mentioned that there was scant objective medical evidence or that Plaintiff's treatment was limited, this was just one factor among many cited by the ALJ in her nondisability determination.

Importantly, Plaintiff improperly conflates the ALJ's mention of the fact that there is limited objective evidence in the record with a determination that Plaintiff failed to obtain appropriate medical treatment. The later situation is governed by SSR 82-59, not the former. SSR 82-59 discusses how the agency may determine that an individual has failed to follow prescribed treatment and instructs the agency to determine whether or not the failure to follow prescribed treatment was justified. Here, the ALJ did not make any finding that Plaintiff failed to follow prescribed treatment. Therefore, SSR 82-59 is inapplicable.

The ALJ cited many factors for determining Plaintiff was not disabled including that the objective medical evidence did not support his testimony of disabling limitations. This evidence

1 included treatment records, State agency examinations and consultative reports, and objective  
 2 diagnostic imaging studies. In addition, the ALJ cited Plaintiff's wide range of reported activities  
 3 from his testimony and function reports, ability to work after his alleged onset date, and the  
 4 conservative treatment modalities used to treat his back and shoulder pain. (AR 26.) The  
 5 determination is supported by substantial evidence in the record.

6 Therefore, Plaintiff's motion should not be granted based on this final argument.

#### 7 **IV. CONCLUSION**

8 After carefully reviewing the record as a whole, the court finds that: (1) the ALJ did not  
 9 err in not finding Plaintiff's mental impairments severe at step two; (2) the ALJ's error in failing  
 10 to mention Dr. Mars' assessments of Plaintiff in 2003 and 2004 is harmless; and (3) the ALJ did  
 11 not inappropriately base her nondisability finding on a failure by Plaintiff to obtain appropriate  
 12 medical treatment without considering his inability to pay and lack of insurance.

#### 13 **V. RECOMMENDATION**

14 **IT IS HEREBY RECOMMENDED** that Plaintiff's Motion for Remand/Reversal  
 15 (Docs. # 14/#14-1) be **DENIED**;

16 **IT IS HEREBY FURTHER RECOMMENDED** that the Commissioner's Cross-  
 17 Motion to Affirm (Doc. # 15) be **GRANTED** and that the decision of the ALJ be **AFFIRMED**.

18 The parties should be aware of the following:

19 1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule IB 3-2 of the Local  
 20 Rules of Practice, specific written objections to this Report and Recommendation within fourteen  
 21 days of receipt. These objections should be titled "Objections to Magistrate Judge's Report and  
 22 Recommendation" and should be accompanied by points and authorities for consideration by the  
 23 District Court.

24 2. That this Report and Recommendation is not an appealable order and that any notice of  
 25 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed  
 26 until entry of the District Court's judgment.

27 DATED: July 27, 2015

28   
 WILLIAM G. COBB  
 UNITED STATES MAGISTRATE JUDGE